Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)))	MB Docket No.17-91

COMMENTS OF CALTEL

Pursuant to the Commission's Public Notice establishing dates for comments on a petition filed by the Multifamily Broadband Council (MBC),[1] and the Order extending the deadline for filing comments on the petition,[2] the California Association of Competitive Telecommunications Companies[3] ("CALTEL") files the following comments on behalf of its members.[4]

I. Introduction and Summary of Arguments Supporting Denial of Petition

In these comments, CALTEL explains why it supported passage of the building access ordinance in San Francisco now known as Article 52 of the San Francisco Police Code (Article 52),[5] and how its members have already benefitted from its enactment. As

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[1] *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, Public Notice DA 17-318, April 4, 2017.

[2] *Order,* MB Docket No. 17-91, Public Notice, DA 17-356, April 13, 2017.

[3] CALTEL is a non-profit trade association working to advance the interests of fair and open competition and customer-focused service in California telecommunications. CALTEL members are *entrepreneurial* companies building and deploying networks to provide competitive voice and broadband services. The majority of CALTEL members are small businesses who help to fuel the California economy through technological innovation, new services, affordable prices and customer choice.

[4] *See* www.caltel.org for a list of CALTEL member companies.

[5] Ordinance 250-16 of the City and County of San Francisco, *Ordinance amending the Police*

discussed in these comments, and in the attached declaration of Dane Jasper, CEO of Sonic Telecom,[6] the ordinance is far from being the "anticompetitive threat"[7] that MBC describes, and is in fact is designed to level the playing field for "small, entrepreneurial start-ups"[8] like Sonic and other CALTEL member companies.

CALTEL also explains that in order to deflect attention from the facts by stating that the ordinance is a "de facto sweetheart deal to large, well-financed entities,"[9] and more specifically to Google, MBC was forced to omit any mention that both CALTEL's Executive Director, and Mr. Jasper, pro-competition advocates, testified in support of the bill at the November 30, 2016 Budget and Finance Committee hearing. In short, Article 52 has already removed real barriers to broadband deployment and competitive choice in San Francisco, and rather than being preempted, it should be submitted to the Commission's newly-appointed Broadband Deployment Advisory Council (BDAC) as an example of a pro-competitive, barrier-removing "model code" for municipalities.[10]

Code to prohibit owners of multiple occupancy buildings from interfering with the choice of communications services providers by occupants, establish requirements for communications services providers to obtain access to multiple occupancy buildings, and establish remedies for violation of the access requirement, passed by the San Francisco Board of Supervisors on December 13, 2016 and signed by Mayor Ed Lee on December 22, 2016 at http://sfbos.org/sites/default/files/o0250-16.pdf (Article 52).

[6] Declaration of Dane Jasper, Sonic Telecom, attached hereto as Exhibit A ("Jasper Declaration").

[7] MBC Petition (Petition) at p. 7, fn 19.

[8] *Id.* at p. 7.

[9] *Id.* at p. ii.

[10] "FCC Announces the Membership and First Meeting of the Broadband Deployment Advisory Committee," DA 17-328, released April 6, 2017 in GN Docket No. 17-83. The notice provided a list of the members of the Committee (BDAC), as well as creation of five working groups, one of

The three grounds for conflict preemption outlined by MBC, and the additional ground for field preemption, are similarly without merit. First, contrary to MBC's claims, the ordinance's provisions with respect to use of existing wire are consistent with the Commission's determinations, rules and regulations. [11] Moreover, MBC's many references to mandated "sharing" of inside wire are a red-herring, as there is no technically-feasible means for two providers to share coaxial cable inside wire without incurring significant degradation of both of their services. Instead, a reasonable reading of the ordinance simply requires the building owner to make the coaxial cable inside wire available to a new provider as an option to installing new wiring, and only if the existing wiring is idle or an existing service using the wiring is being disconnected and replaced with a new service.

Second, MBC claims incorrectly that the ordinance vitiates the Commission's bulk billing policies. The Commission, in its Second Report and Order decided not to prohibit building owners and providers from entering into bulk-billing arrangements, but only because the Commission determined that such an agreement does not "physically or

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which is focused on developing a "Model Code for Municipalities." This working group will be chaired by Douglas Dimitroff of the New York State Wireless Association, and co-chaired by Sam Liccardo, the mayor of San Jose, California. *See also* "FCC Announces the Membership of Two Broadband Deployment Advisory Committee Working Groups: Model Code for Municipalities and Model Code for States," DA 17-433, released May 8, 2017, GN 17-83.

[11] Article 52 defines "existing wire" as "both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(ll) respectively, except those terms as used herein shall apply only to the home run wiring or cable home wiring owned by a property owner." Article 52 at Sec. 5200. CALTEL will refer to this wiring as "coaxial cable inside wire" in order to distinguish it from the twisted-pair telecommunications wiring that is also discussed in the Petition and in these comments,

legally prevent a second MVPD[12] from providing service to an MDU resident and does not prevent such an MVPD from wiring an MDU for its service, subject to the permission of the MDU owner."[13] In fact, in reaching this determination, the Commission recognized that bulk billing arrangements might "discourage" new providers from entering an MDU and prevent MDU occupants from ordering service from a second provider (because they must pay for two services).[14] Obviously, this is not the case in San Francisco, where MDU occupants have shown a significant interest in the fiber-to-the-premises services that Sonic is deploying.[15] In short, nothing in Article 52 prohibits existing or new bulk billing arrangements or changes the balancing of interests that the Commission already took into account.

Third, MBC makes a somewhat bizarre claim that Article 52 "effectively imposes a rudimentary and unqualified 'unbundling' mandate that starkly contrasts with the balanced federal unbundling requirements of Section 251 of the Communications Act."[16] To the degree that CALTEL is able to follow MBC's argument, it should be rejected on

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[12] The Commission's two orders on exclusive contracts for video services which are discussed in the Petition and these comments refer to Multichannel Video Programming Distributors, or MVPDs. CALTEL understands the term to refer generically to franchised Multiple System Operators (MSOs), Private Cable Operators (PCOs), and Distributed Broadcast Satellite (DBS) providers.

[13] Second Report and Order, *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* MB Docket No. 07-51, released March 2, 2010 at ¶ 15 ("Exclusivity Second Report and Order").

[14] *Id.* at ¶ 16.

[15] Jasper Declaration at ¶ 13.

[16] MBC petition at p. iii.

the grounds that coaxial cable inside wire owned by property owners is not a Section 251 network element, nor is it a "fiber loop"[17] that the Commission has found to be exempt from unbundling.

Finally, MBC claims that the Commission should preempt Article 52 because it occupies the field with regard to coaxial cable inside wire. As a legal matter, a federal occupation of a field (such as for commercial aviation) requires either an explicit finding by the federal agency or U.S. Congress, or the scheme of federal regulation must be so pervasive as to make reasonable an inference that Congress left no room for the states to supplement it.[18] There is no express federal preemption or pervasive federal regulation to support an implied preemption on the issues raised in MBC's petition. The legal test is whether a local jurisdiction's regulations can coexist with federal regulations. So long as a regulated entity can comply with local regulations without violating the federal regulations, the local regulations are not preempted.[19] As CALTEL has already explained, nothing in Article 52 conflicts with any of the Commission's rules, regulations and prior determinations with regards to inside wire, especially with regard to the literal, simultaneous "sharing" of that wiring by two service providers, and therefore MBC's occupation of the field argument is legally flawed and should be disregarded.

CALTEL therefore urges the Commission to deny MBC's petition for

[17] *Id.* at p. iii and p. 29.
[18] *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta* (1982) 458 U.S. 141, 153.
[19] *Id.*

preemption.

II. Background

CALTEL is a non-profit trade association that represents the interests of its members before the California Public Utilities Commission (CPUC), the California State Legislature, and the California Governor's Office. CALTEL also participates in Commission proceedings, especially where there is an opportunity and/or need to provide input that is specific to the market for communications services in California.

Although CALTEL does not routinely participate in legislative activities at the local level, the draft building access ordinance introduced by Supervisor Mark Farrell of the City and County of San Francisco was of keen interest to one of CALTEL's member companies, Sonic Telecom, and represented an opportunity to weigh in on a policy issue that has long been of interest to CALTEL. CALTEL's Executive Director was contacted by a member of Supervisor Farrell's staff prior to introduction of the proposed ordinance, and CALTEL had the opportunity to provide additional input. As a result, CALTEL's Executive Director, Sarah DeYoung, and Dane Jasper, CEO of Sonic Telecom (and Co-Chair of CALTEL's Board of Directors) attended the legislative hearing on the proposed ordinance in the Budget and Finance Committee meeting on November 30, 2017, and testified in support.[20] Also testifying in support was the CEO of Webpass

[20] City and County of San Francisco, Meeting Minutes of November 30, 2016 Budget and Finance Committee meeting, p. 7 at http://sfbos.org/sites/default/files/bfc113016_minutes.pdf . An archived webcast of the hearing is also available at

Communications, which was not a member of CALTEL,[21] as well as representatives from the San Francisco Chamber of Commerce, the Building Owners and Managers Association of San Francisco, the San Francisco Apartment Owners Association, Media Alliance, the Electronic Frontier Foundation, "Our City," the Public Net Coalition SF, the Coalition for Better Housing and the San Francisco Bay Area Renters Association.

Based on the websites of MBC and its individual members, MBC's non-vendor members appear to be private cable operators (PCOs) that primarily deliver video programming through an affiliate agreement with either Dish Network or DirecTV services to MDUs (what one MBC member terms a "shared dish provider").[22] CALTEL's member companies are all competitive local exchange carriers (CLECs) that are certificated by the CPUC and who provide voice and broadband services to business

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http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=7&clip_id=26664 . Ms. DeYoung testified about problems that CALTEL member companies experience gaining access to commercial buildings. CALTEL also wrote a letter to each member of the Board of Supervisors on December 6, 2016, urging passage of the proposed ordinance.

[21] Google Fiber, which has acquired Webpass, joined CALTEL in January, 2017.

[22] *See* "Due Diligence", Blue Top Solutions, at *http://bluetopsolutions.com/index.php?option=com_content&view=article&id=49&Itemid=58* . CALTEL is actually confused about who the members of MBC currently are. The Petition (at p. 1, fn 1) lists a number of companies, such as Giga Monster, Elauwit Networks and Satel, which are not listed as members on the MBC website (http://www.mfbroadband.org/member-directory). This is especially confusing with regard to Satel, whose President and CEO sponsored one of two declarations attached to the Petition. It is therefore not clear whether any of the members listed on MBC's website provide services in San Francisco. Furthermore, when CALTEL accessed the online member directory earlier this year, DirecTV was also listed as a member (s*ee* http://www.sfgate.com/business/article/SF-Internet-access-ordinance-under-fire-from-10970408.php).

and residential customers.[23] Although Sonic Telecom also has obtained a statewide video franchise from the CPUC, it does not currently provide video services as either a Multichannel Video Programming Distributor (MVPD) or Open Video System (OVS) provider.[24]

As discussed in Mr. Jasper's declaration, Sonic expanded its independent ISP business in 2006 to apply for a Certificate of Public Necessity and Convenience (CPCN) from the CPUC in order to form a new CLEC entity that could offer voice and broadband service to residential and business customers in California. Sonic then negotiated a Section 252 interconnection agreement with AT&T, and deployed colocation equipment in a number of central offices in order to lease unbundled copper loops from AT&T and combine them with other components of its network and back office systems. Sonic's offer of a $40-$50 per month unlimited Internet and home phone bundle to residential customers in a number of communities across Northern and Southern California has been very successful, and in 2012, Sonic had sufficiently grown its customer base to begin trialing a gigabit fiber-to-the-premise (FTTP) product using self-deployed fiber loops. Following trials in the California communities of Sebastopol and Brentwood, Sonic began deploying its FTTP product in the Sunset, Richmond and Parkside districts of San

[23] Some CALTEL member companies also provide wholesale services (such as wireless backhaul circuits and other middle mile facilities) to other communications providers.

[24] Sonic is partnering with Dish Network to offer video services to its customers. Sonic customers can save $120 on their Sonic bills ($10 per month over the first year) when a customer becomes a Dish subscriber. *See* https://www.sonic.com/dish .

Francisco last year. Sonic's facilities-based fiber deployment has caused it to encounter a number of barriers that it had not previously faced with its UNE-Loop (UNE-L) based services, including unreasonable delays and costs associated with access to poles, conduits, local permitting processes, and access to MDUs.[25]

III. Discussion

A. Article 52 Has Already Removed Barriers to Broadband Deployment and Competitive Choice in San Francisco

1. Sonic Experienced Resistance from MDU Owners and Managers in San Francisco Prior to Passage of Article 52

In mid-2016, Sonic began to encounter problems gaining access to some MDUs in San Francisco. For example, when Mr. Jasper informed one building manager that Sonic had received nine requests for service and was anxious to gain access to the building to install new facilities and equipment, he was told that the building owner had had a bad experience with a Verizon Wireless antenna on the rooftop and did not want to provide access to any other providers. Despite attempts to explain and clarify that Sonic's fiber facilities are substantially different than cellular from a regulatory perspective and use of building infrastructure to support its facilities, Mr. Jasper was told by a representative of the property management firm that "the owner does not approve of installing Sonic in the building. I recommend that you not waste any more time and

[25] Jasper Declaration at ¶ 15.

resources pursuing this further."[26]

As Mr. Jasper testified at the San Francisco Budget and Finance Committee hearing on the proposed ordinance on November 30, 2017, stating:

> As San Francisco residents choose to subscribe to Sonic's gigabit fiber Internet and telephone services, we're encountering issues with multi-tenant building entry on a daily basis. While the majority of building owners see the value in having a gigabit fiber service available to their tenants, a number of building owners have refused to voluntarily allow us access to their buildings to reach residences and deliver services. High-speed internet access is essential for residents and businesses in San Francisco and it is uniquely frustrating for residents who have gigabit fiber at their doorstep but who have been blocked from being connected by their landlord.[27]

Following passage of the ordinance, the San Francisco Chronicle reported that Mr. Jasper stated that it would be "particularly helpful when it comes to making the process of choosing a new provider more transparent for all parties involved, as well as 'making it clear that consumers should be given the choice of more than just one or two carriers."[28]

2. How Article 52 Works

For a competitive service provider like Sonic, Article 52 sets out an orderly and time-bound process for obtaining access to San Francisco MDUs:

[26] Jasper Declaration at ¶ 17.
[27] Webcast of Budget and Finance Committee meeting of November 30, 2016 at http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=7&clip_id=26664 .
[28] "New Ordinance gives SF apartment dwellers more Internet options," San Francisco Chronicle, dated December 24, 2016 at http://www.sfchronicle.com/business/article/New-ordinance-gives-SF-apartment-dwellers-more-10816442.php .

- Upon receiving a request for service from one or more MDU tenants, the service provider is required to make a written request at least 14 days in advance to inspect the property. This written request must conform to a number of specifications in the ordinance (Section 5204);
- The property owner has until three days before the proposed inspection date to notify the service provider in writing that the requested inspection will either be allowed or refused. This written response must conform to a number of specifications in the ordinance (Section 5204 and 5206);
- Following inspection, the service provider must send a written notice of intent to provide service at least 30 days before the proposed installation date. This written request must conform to a number of specifications in the ordinance, including identifying the amount of just and reasonable compensation the service provider proposes to pay (Section 5205);
- The property owner has until 5 days before the proposed installation date to notify the service provider that 1) the requested installation will be allowed, 2) the requested installation will be allowed, but the property owner does not agree with the proposed amount of compensation or 3) the request to install is refused. This written response must conform to a number of specifications in the ordinance, including identifying the amount of compensation that the property owner is willing to agree to

(Section 5205 and 5206);

- Once a property owner has granted access to the property, the service provider must comply with any other requirements identified by the property owner pursuant to the ordinance (Section 5207);
- If the service provider believes that the property owner is in violation of the requirements and specifications in the ordinance, it must notify the property owner in writing 10 days before taking enforcement action (Section 5209).

3. Sonic Has Already Benefitted from Article 52 Since Its Passage

Since Article 52 went into effect in January, 2017 (30 days following passage and being signed by Mayor Lee), Sonic has been significantly more successful in gaining access to MDUs in San Francisco. As discussed in Mr. Jasper's declaration, having a written timeline and process has been particularly helpful in educating property owners about their rights and obligations under the ordinance, and has also helped Sonic gain access to MDUs where property owners had previously denied it.[29]

4. Article 52, While Not Perfect, Is an Example of a Pro-Competitive, Barrier-Removing Local Ordinance

Finally, Sonic's experience disproves MBC's claim that as a result of Article 52 there will be "less investment in broadband deployment, and less consumer choice"[30].

[29] Jasper Declaration at ¶ 21.
[30] Petition at p. ii.

As reported in the San Francisco Chronicle, Mr. Jasper explained why MBC's claim is 100% incorrect:

> Dane Jasper, the CEO of Sonic, a Santa Rosa high-speed broadband provider that is not a Multifamily Broadband Council member, was puzzled by the group's arguments that the ordinance will hobble regional companies like his from competing. The effect so far has been just the opposite. The ordinance, he said, is "essential for competitive access. The economic harm we suffer is if we're not allowed to enter and serve the customers who have signed up for our service." Sonic, he said, has already benefited from the ordinance, having gained entry to apartment buildings where landlords had previously denied access. The broadband council's petition to the FCC, Jasper said, "just seems backward."[31]

CALTEL agrees. With regard to competitive choice, CALTEL notes that its members are CLECs that routinely compete in the market against each other on a daily basis. MBC's claim that the ordinance is "a sweetheart deal for Google that, under the guise of promoting competition, helps preclude Google's rivals from meaningful participation in the affected markets"[32] is particularly ludicrous. As noted by Webpass' CEO at the public hearing on November 30, 2016,[33] Sonic and Webpass are competing head-to-head in San Francisco, and Article 52 has made that even more of a reality.

Although the ordinance is not perfect, rather than being preempted, it should be submitted to the Commission's newly-appointed Broadband Deployment Advisory

[31] "SF Internet Access Ordinance Under Fire from Trade Group," San Francisco Chronicle, dated March 1, 2017, at http://www.sfgate.com/business/article/SF-Internet-access-ordinance-under-fire-from-10970408.php.

[32] Petition at p. 2.

[33] Webcast of Budget and Finance Committee meeting of November 30, 2016 at http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=7&clip_id=26664 .

Council (BDAC) as an example of a pro-competitive, barrier-removing "model code" for municipalities.[34]

B. MBC's Grounds for "Conflict Preemption" Are Without Merit

1. Article 52's Provisions With Regard to the Use of Existing Wire Are Not In Conflict with the Commission's Prior Determinations, Rules and Regulations

In its petition, MBC states that Article 52 allows "additional providers to use the property owner's existing wiring even if another provider is already using it,"[35] and "applies regardless of whether the property owner has existing contractual arrangements with one or more communications providers currently serving the property" such as "a right of exclusive use of designated wiring owned by the property owner."[36] MBC is correct on the second point, but not on the first.

As background, with regard to exclusive wire agreements, CALTEL is aware that the Commission did not include "wire exclusivity" or "marketing exclusivity" contract clauses in its prohibition against exclusive service agreements in the 2007 Report and Order on exclusive video service contracts in MDUs.[37] This was because the

[34] "FCC Announces the Membership and First Meeting of the Broadband Deployment Advisory Committee," DA 17-328, released April 6, 2017 in GN Docket No. 17-83. The notice provided a list of the members of the Committee (BDAC), as well as creation of five working groups, one of which is focused on developing a "Model Code for Municipalities." This working group will be chaired by Douglas Dimitroff of the New York State Wireless Association, and co-chaired by Sam Liccardo, the mayor of San Jose, California.

[35] Petition at p. ii and p. 3.

[36] *Id.*

[37] Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Exclusive*

Commission reasoned that these types of exclusivity clauses "do not absolutely deny new entrants access to MDUs or real estate developments and thus do not cause the harms to consumers that building exclusivity clauses cause."[38] The FCC has thus far refrained from extending these prohibitions to PCOs or DBS providers.[39]

Information contained on MBC member websites confirm continued resistance to in-building competition, including use of building exclusivity contracts as well as wire exclusivity and bulk billing arrangements. For example, one such website states that:

> The property owner must (be) willing to enter into a bulk *or exclusive contract for video service* or allow exclusive access to the existing coaxial cable wiring, which must be owned by the property owner. (FYI – An

Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51, released November 13, 2007, at ¶ 1, fn 2 ("Exclusivity Report and Order and FNPRM").

[38] *Id.*

[39] It appears that a predecessor organization of MBC, namely the Independent Multifamily Communications Council (IMCC)[39] participated actively in that proceeding to argue that the Commission should on the one hand invalidate the use of exclusivity contracts by incumbent cable providers, but on the other hand protect the use of such contracts by PCOs, and should do so based on many of the same arguments found in the Petition. *See, e.g.* Exclusivity Report and Order and FNPRM at ¶ 8, fn 19 (complaining about use of exclusivity agreements by incumbent cable operators to "foreclose significant portions of the MVPD market to new entrants"; ¶ 24, fn 72 (exclusivity contracts may help with financing); ¶ 38, fn 116 (arguing that prohibitions against exclusivity agreements should not apply to MVPDs that lack market power; ¶ 61, fn 188 (stating that without exclusivity contracts, PCOs could not continue to offer custom products or survive). *See also* Exclusivity Second Report and Order at ¶ 17, fn 25 (stating that if bulk billing arrangements are invalidated, PCOs would default on loans and be able to secure new financing; ¶ 17, 19 fn 26, 36 (concluding that if PCOs were unable to enter into bulk billing arrangements, consumers would pay higher prices). However, see online article by current MBC member, and former IMCC counsel, Carl Kandutsch dated May 2, 2014 contending that the Commission should "step in to rule on exclusive use of inside wiring clauses in ROE (right of entry) agreements that have the purpose and effect of circumventing the Commission's pro-competition rules and policies." *See* "Exclusive Use of Inside Wiring Clauses in Cable ROE Agreements" at http://www.kandutsch.com/blog/exclusive-use-of-inside-wiring-clauses-in-cable-roe-agreements .

> opportunity to co-exist and compete with the incumbent provider on the same property is not a terribly attractive opportunity for a new provider. Co-existing opportunities result in higher marketing costs for fewer subscribers. Fewer subscribers will often result in higher customer pricing. Ultimately, higher pricing will result in continued independent satellite dish installations. (Emphasis added) [40]

Regardless of MBC's preferences and purported justification for these exclusive arrangements,[41] and their questionable assertion that such agreements benefit all MDU owners and occupants, Article 52 does not "vitiate"[42] existing wire exclusivity arrangements or prevent negotiation of new ones. It neither requires an existing provider like one of MBC's member to relinquish cable inside wire to a new provider that it is using to provide service to an occupant, nor "share" that wire with new providers (even if that were technically-feasible).

Instead, Article 52 states that a property owner must not interfere with an occupant's choice of provider by refusing to allow the new provider to 1) install facilities

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[40] *See* "Due Diligence", Blue Top Solutions, at ¶*http://bluetopsolutions.com/index.php?option=com_content&view=article&id=49&Itemid=58* .

[41] One of MBC's claims is that the ability of small providers to obtain third-party financings is dependent on evidence of "likely success, such as an agreement granting the provider undisturbed use of inside wiring owned by the property owners or a bulk billing arrangement." Petition at p. 7. As discussed in Mr. Jasper's declaration, Sonic does not require evidence of exclusive contracts to secure financing (Jasper Declaration at ¶ 13), and to CALTEL's knowledge, neither do any of its even smaller members. CALTEL also notes that the Commission determined in its dismissal of MBC's Petition requesting a Declaratory Ruling that Article 52 violates the Commission's OTARD rule that the Commission's rules "exist to enable consumers to use the services of their choosing free from undue restrictions imposed by property owners or governmental authorities, and not to protect the ability of any particular service provider to secure financing by excluding others." Letter to Bryan N. Tramont, dated May 4, 2017, DA 17-421, at p. 3.

[42] Petition at p. 18, fn 61.

and equipment necessary to provide service or 2) use any "existing wiring"[43] to provide the service. This does not conflict with the Commission's previous determinations.

Several examples can be posited to see why this is true. Looking first at an example in which a PCO has a contract granting exclusive right to the existing wiring to provide shared-dish video services to all the occupants of an MDU, and one or more occupants wishes to obtain a bundled voice and broadband service from a provider like Sonic, but keep the PCO's video service, there is no impact on that agreement or on the continued availability of those video services. Section 5206 would ensure protection for the existing provider to the extent that use of the existing wiring would interfere with their ability to continue providing video service to the requesting occupant.

Even in a scenario in which a new provider is a franchised cable provider (MSO), such as Comcast, that uses coaxial cable to deliver video and other communications services, other sections in the ordinance will ensure that the PCO does not need to relinquish the wiring to an occupant's unit unless it is already idle or being disconnected to be replaced with the new services. Were this situation to occur, Article 52 permits the MDU owner to refuse to allow the MSO to move forward with the installation on the

[43] Article 52 limits the definition of "existing wire" to include home run wiring and cable home wiring as those terms are defined in the Commission's rules, and is also limited to wiring that is owned by the property owner. Despite MBC's claims that the ordinance likely implicates twisted-pair telecommunications wiring in a way that will confuse or put property owners at further risk (Petition at pp. 20-21), Mr. Jasper explains that there has been no contest or controversy regarding access to the telecommunications twisted-pair wiring where Sonic needs it to deliver its DSL services. Jasper Declaration at ¶ 24).

grounds that it would "have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property."[44] It is important to note that such a refusal is based on the impact that installation would have on existing service to an individual MDU occupant, and not on the existence of an exclusivity agreement.

These examples clearly demonstrate that Article 52 does not force existing providers to relinquish existing wire that is being used to provide service to an MDU occupant, as asserted by MBC in several instances.[45] But MBC's more frequent claim is that the ordinance mandates existing providers to literally "share" existing wiring.[46] As the Commission has already determined, and as Mr. Jasper explains, it is technically infeasible for two providers to literally "share" coaxial cable inside wire without significant degradation to both of their respective services.[47] Moreover, Article 52 never uses that term, or even implies that such an outcome is intended. Given these real-world facts and circumstances, MBC's interpretation of the ordinance is clearly unreasonable and unnecessarily hyperbolic.

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[44] Article 52 at Section 5206, Permitted Refusal of Access, Section (b): "Nothing in this Article 52 shall be construed to require a property owner to allow a communications services provider to install the facilities and equipment that are necessary to offer services to occupants where:…(5) The communications services provider's proposed installation of facilities and equipment in or on the property would…(C) have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property."

[45] Petition at p. ii and p. 3.

[46] There are over 40 references to wire "sharing" in the Petition.

[47] Jasper Declaration at ¶ 25).

Instead, as demonstrated in the examples described above, a reasonable reading of the ordinance is that the building owner must allow (subject to a number of permitted exclusions) the new provider to install facilities and equipment, with an option to make the cable inside wire available if and only if the existing wiring is idle or an existing service using the wiring is being disconnected and replaced with a new service. The realities of the market and the limitations of current technologies, such as in all cases where Sonic has deployed or plans to deploy fiber-to-the-premise services to San Francisco MDUs, results in the installation of new building wiring that in no way invalidates or interferes with any "wire exclusivity" contracts that might be in place. But to the extent that existing wiring is available and otherwise idle, Article 52 facilitates use by another party in ways that are consistent with the intent of the Commission's existing rules, ensuring competition and consumer choice.

2. Article 52 Does Not Prohibit Bulk Billing Arrangements or Change the Policy Considerations that the Commission Has Already Taken Into Account

MBC makes a variety of claims regarding Article 52's impact on another type of contractual arrangement that its members apparently enter into with property owners, i.e. bulk billing arrangements. MBC claims that that Article 52 is in conflict with the Commission's policies with regards to bulk billing arrangements because it "effectively bar(s)" them by "forcing property owners to accommodate multiple providers, thereby destroying the economic rationale on which such deals are struck and raising prices for tenants."[48]

MBC goes on to claim that in the Second Report and Order on exclusive video service contracts in multiple dwelling units (MDUs),[49] the Commission "expressly endorsed" such arrangements and found that the "benefits outweigh (the) harms."[50] But other than acknowledging that such arrangements rely on the "ability to serve all *or almost all"*[51] (emphasis added) tenants in an MDU, MBC neglects to mention that the Commission decided not to prohibit building owners and providers from entering into bulk-billing arrangements primarily because they do not prevent competition within an MDU:

> We conclude that the benefits of bulk billing outweigh its harms. A key consideration for us is that bulk billing, unlike building exclusivity, does not hinder significantly the entry into an MDU by a second MVPD and does not prevent consumers from choosing the new entrant. [52]

In fact, in reaching this determination, the Commission recognized that bulk billing

[48] *Id.* at p. 23. As discussed earlier, another of MBC's claims is that the ability of small providers to obtain third-party financings is dependent on "evidence such as a bulk billing arrangement." Petition at p. 23. As discussed in Mr. Jasper's declaration, Sonic does not require evidence of exclusive contracts to secure financing (Jasper Declaration at ¶ 13), and to CALTEL's knowledge, neither do any of its even smaller members. CALTEL also notes that the Commission determined in its dismissal of MBC's Petition requesting a Declaratory Ruling that Article 52 violates the Commission's OTARD rule that the Commission's rules "exist to enable consumers to use the services of their choosing free from undue restrictions imposed by property owners or governmental authorities, and not to protect the ability of any particular service provider to secure financing by excluding others." Letter to Bryan N. Tramont, dated May 4, 2017, DA 17-421, at p. 3.

[49] *See* Exclusivity Second Report and Order.

[50] Petition at p. 22.

[51] *Id.* at p. 23.

[52] Exclusivity Second Report and Order at ¶ 26.

arrangements might "discourage" new providers from entering an MDU and prevent MDU occupants from ordering service from a second provider (because they must pay for two services).[53] Nonetheless, the Commission concluded that "many commenters indicate that second MVPD providers wire MDUs for video service even in the presence of bulk billing arrangements and that many consumers choose to subscribe to those second video services."[54]

The experience in San Francisco is that bulk billing arrangements have not deterred second providers from entering. MDU occupants have shown a significant interest in the fiber-to-the-premises services that Sonic is deploying despite the presence of an existing video provider. In short, nothing in Article 52 prohibits existing or new bulk billing arrangements or changes the policy considerations and trade-offs that the Commission already took into account.

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3. Article 52 Is Not an "Unbundling Mandate"

MBC's third ground for preemption is a convoluted and bizarre claim that Article 52 "effectively imposes a rudimentary and unqualified 'unbundling' mandate that starkly contrasts with the balanced federal unbundling requirements of Section 251 of the

[53] *Id.* at ¶ 16. MBC seems to suggest that property owners bear the cost of paying for services for which they will not be reimbursed when a tenant selects a provider other than the bulk billing service provider, but MBC does not explain why that would be the case. Petition at p. 23.

[54] *Id.* ¶ 26.

Communications Act."[55]

This argument is difficult to follow, but it appears that MBC is making an analogy between access to coaxial cable inside wire owned by property owners and the unbundling of network elements owned by an incumbent local exchange carrier (ILEC) pursuant to Section 251 of the Act. Once all of the MBC's recitation and rhetoric about the history of Section 251 unbundling is stripped away, MBC ventures beyond the realm of analogy to claim that Article 52 "specifically contravenes the Commission's deliberate refusal to force facility owners in MDUs to share their fiber loops."[56]

But "facility owners" in MDUs own only inside wire, not "fiber loops". To be sure, the Commission has defined a local loop to include inside wire, but only when it is "owned or controlled by the incumbent LEC."[57] And coaxial cable inside wire owned by

[55] Petition at p. iii.

[56] *Id.* at p. iii and p. 29. CALTEL assumes that when MBC uses the term "facility owner" it is referring to property owners, as that is the only type of wiring implicated by Article 52. Not that it would matter, since for all practical purposes, only a very small percentage of MDU wiring is still owned by an incumbent provider. *See* article on MBC member company Broadband Properties website (http://www.broadbandproperties.com/2001%20issues/Jan_2001_Features/How%20to%20Make%20an%20Incumbent%20.htm)explaining in 2001 (over 15 years ago) that "since the turnover in most multifamily properties is quite high, it is a safe assumption that at least 90% of the Cable Home Wiring in multifamily properties in America now belongs to the property owner."

[57] 47 C.F.R. 51.319(a). A local loop is a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises" which also includes "all electronics, optronics, and intermediate devices (including repeaters and load coils) used to establish the transmission path to the end-user customer premises as well as any *inside wire owned or controlled by the incumbent LEC* that is part of that transmission path." (Emphasis added).

property owners similarly does not qualify as a "fiber loop"[58] that the Commission declined to unbundle in the Triennial Review Order.[59] MBC's petition makes no credible case that either is true, and its unbundling argument should therefore be entirely disregarded.

C. MBC's Ground for "Field Preemption" Is Similarly Without Merit

Finally, MBC claims that Article 52 is also a candidate for "field preemption" because it requires mandatory "wire sharing" in violation of the Commission's inside wire rules and two prior determinations by the Commission to reject proposals to adopt such a requirement.[60]

As CALTEL has already discussed, Article 52 does no such thing. There is no reference in the ordinance to "wire sharing," and a reasonable reading of the ordinance is that the building owner must allow (subject to a number of permitted exclusions) a new provider to install facilities and equipment, with an option to make the cable inside wire available if and only if the existing wiring is idle or an existing service using the wiring is being disconnected and replaced with a new service.

Moreover, as MBC notes that the Commission has already determined,[61] it is

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[58] 47 C.F.R. 51.319(a). A fiber loop is a "*local loop* consisting entirely of fiber optic cable, whether dark or lit, serving an end user's customer premises or, in the case of predominantly residential multiple dwelling units (MDUs), a fiber optic cable, whether dark or lit, that extends *to* the multiunit premises minimum point of entry (MPOE)." (Emphasis added).
[59] Petition at pp. 27-28.
[60] Petition at p. iii and pp. 29-32.
[61] *Id.* at pp. 30-31.

technically infeasible for two providers to literally and simultaneously "share" coaxial cable inside wire without significant degradation to both of their respective services.

IV. Conclusion

For the reasons outlined above, CALTEL requests that the Commission deny the Petition of the Multifamily Broadband Council to Preempt Article 52 of the San Francisco Police Code.

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Respectfully submitted,

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